Habeas Corpus in Immigration Cases

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> No free man shall be taken or imprisoned or disseized or exiled or in any way destroyed except by the lawful judgment of his peers or by the law of the land.[1]

The use of the writ of habeas corpus in immigration cases has from time to time received such publicity as to make it worthy of public interest. To the lawyer, however, as the law has recently developed, the wide acclaim of the use of the writ as the single method of appeal in immigration cases is open to grave question. The Attorney General of the United States has suggested that the writ of habeas corpus "should be used to obtain review of exclusion and deportation orders."[2] The attitude of the Attorney General, as will be later illustrated, has been to insist that immigration cases can be reviewed only through the use of the writ of habeas corpus. The concern with which the Attorney General has opposed the use of the Administrative Procedure Act[3] in this field, and his attempts to bring about legislation expressly exempting the Immigration and Naturalization Service from its provisions, are survivals of a policy established long ago by governing forces jealous of the prerogatives of the Crown, and of the low estate in which the alien or foreigner was generally held. An analysis of the immigration laws, and a consideration of their application to modern life, clearly indicate that the writ of habeas corpus no longer suffices to solve the problems which arise under them.

"The right of personal liberty" forms the basis of an analysis which indicates the extent to which it becomes necessary to study the historical nature of habeas corpus, in order to understand the author's objection to carte blanche use of that writ in immigration cases.[4] It is not sufficient to assert that a writ can issue, and then assume that the problems which the alien faces are subject to judicial review and solution.

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[1] Magna Carta, Par. 39, (1215).

[2] See Atty. Gen. Manual on the Admin. Proc. Act 97 (1947).

[3] Act of June 11, 1946, 60 STAT. 237 (1946); 5 U.S.C. §1001 (1946).

[4] See 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 104 et sep.

THE HISTORICAL BACKGROUND

The history of the development in the common law of the writ of habeas corpus goes back first to the old writ of *De Homine Replegiando*.[5] This writ was the equivalent of a writ of replevin as issued for personal property, and directed the sheriff to remove a man who was in custody of the person named in the writ. It was treated as if the man himself were personal property and the returns on the writ were the same returns as the sheriff might make on a writ of replevin. Second, there was the old writ of Mainprize[6] which was again in the nature of an order to the sheriff to produce a man so as to allow the entry of bail for an appearance. Third, there was the writ of *De Odio Et Atia*.[7] This writ was intended to protect the liberty of the person from unwarranted attack based upon ill will, malice or revenge. If it appeared that he was incarcerated to serve some personal bias, the defendant was entitled to his discharge. These ancient writs, which later merged into the writ of habeas corpus, in their fullest scope laid stress on the unjust and unlawful detention of the physical being of the defendant, as if liberty was wholly encompassed in freedom from incarceration. Privileges, rights as against the government as guaranteed by statute in their present sense, could find no relief in the use of any three of these writs. Much less available would be the relief needed, as will be shown, by aliens whose liberties have been restricted or who have been deprived of liberty without actual incarceration (for these, too, exist). It is important to realize and understand the narrow and confining character of the writ of habeas corpus by a further study of the writ itself, as it developed.

Previous to the Act of Parliament of 1679, even the writ of habeas corpus proper had its twists and turns. There were: the writ of Habeas Corpus *Ad Respondendum* to secure the appearance of the defendant in an action; the writ of habeas corpus *Subjudiciendum* to require one to produce another who was under his control; and a writ of habeas corpus to effect the appearance of

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[5] 3 BL. COMM. 129, stating that it lies to replevy a man out of prison, or out of the custody of any private person.

[6] 3 BL. COMM. 127: "is a writ directed to the Sheriff (either generally, when any man is imprisoned for a bailable offence and bail has been refused; or specially, when the offence or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, usually called MAINPERNORS, and to set him at large."

[7] 3 BL. COMM. 127: "was anciently used to be directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely PROPTER ODIUM ET ATIAM, for hatred and ill will; and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail."

a jury.[8] Blackstone further refers to the writ of habeas corpus *Ad Prosequendum, Testificandum, Deliberandum,*[9] which was used to remove a prisoner to another court; and a writ of habeas corpus *Ad Faciendum Et Recipiendum* to remove an action from a lower to a higher court, at the same time directing the lower court to produce the defendant for the action of the higher court. In all of these refinements of habeas corpus, before the English law was crystallized in the Act of 1679, the emphasis was upon the *body* of the defendant. No matter what else was added, the main purport of the writ was to allow a judicial review of the right of the captor to have the physical possession of the body of his captive.

The principal statute on this subject in the old English law is the famous Habeas Corpus Act of 1679.[10] That Act took the ancient writ of habeas corpus *Ad Subjudiciendum* and incorporated it, as the principal feature, into a system of protection of the personal liberty of the defendant. The Act provided that the writ might issue at any time unless the prisoner was being held for treason or felony which was clearly shown in a commitment under which he was held, or was imprisoned for a conviction or as a result of a legal process. Prisoners were to be accorded a quick trial; they could not be moved after confinement except for specific causes, and could not be sent to Scotland, Ireland or parts beyond the seas. It requires no student of history to recall that James II sought to have it repealed.[11] Even to the extent that this statute may be considered the beginning of protection for a defendant, there were defects in it. It was said that "The Court had no power to examine the truth of any return made by a gaoler."[12] And what is more important, the Act of 1679 did not apply to "a detention which was not a detention on a criminal charge."[13] There was opposition to any extension of the rights granted under it; and Holdsworth describes the resulting struggle between the Crown and the courts, and among the courts themselves.[14]

This, then, is the background which must be observed in appreciating the value of the writ of habeas corpus, its historical significance and its metes and bounds. The development of the English common law, even into the 20th century, has not materially changed its scope . It is still circumvented by means of ancient and paradoxical phrases. It is still limited to a discussion of a return made by the jailer of the person whom he has jailed.

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[8] See HOLDSWORTH *op. cit. Supra,* note 5.

[9] 3 BL. COMM. 130.

[10] 31 Charles II, c. 2.

[11] See 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 118.

[12] See 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 119.

[13] See note 12, *supra.*

[14] See 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 121 et seq.

That there should be an actual and partial revolt against the confining area of review in a writ of habeas corpus, was illustrated by the decision of the Court of Appeals in the 9th Circuit in *Bridges v. Wixon.*[15] This was a review of a deportation order by the Attorney General through the use of a writ of habeas corpus but the Court used historic and important language in pointing out the obliqueness of the use of the writ for that purpose. The Court said:

> The courts have uniformly held that Congress cannot authorize a deprivation of liberty without due process of law as provided in the Constitution by the device of making the fact findings of an administrative board conclusive on the courts. That is to say, findings made without supporting evidence or without a hearing before the administrative body or officer are held by the courts to be void. Hence, on this purely collateral proceeding in habeas corpus, the validity of the order of the Attorney General for detention for deportation may be questioned but only to the extent necessary to determine whether there has been a denial of due process by the Attorney General.

In the same case when it reached the Supreme Court,[16] the Court observed:

> In these *habeas corpus* proceedings we do not review the evidence beyond ascertaining that there is some evidence to support the deportation order. Vajtauer v. Commissioner, 273 U.S. 103, 106, 47 S. Ct. 302, 304, 71 L. Ed. 560 . . . . Congress has committed the conduct of deportation proceedings to an administrative officer, the Attorney General, with no provision for direct review of his action by the courts. Instead it has provided that his decision shall be "final," 8 U.S.C. Par. 155, as it may constitutionally do. Zakonaite v. Wolf, 226 U.S. 272, 275, 33 S. Ct. 31, 32, 57 L. Ed. 218, and cases cited. Only in the exercise of their authority to issue writs of habeas corpus, may courts inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution. Bilokumsky v. Tod, 263 U.S. 149, 153, 44 S. Ct. 54, 55, 68 L. Ed. 221; Vatjauer v. Commissioner of Immigration, supra. And when the authority to deport the alien turns on a determination of fact by the Attorney General, the courts, as we have said, are without authority to disturb his finding if it has the support of evidence of any probative value.

It is interesting to read the very candid statement of the Supreme Court that the writ of habeas corpus in deportation cases really retains its original concept as a writ to test the right of the captor to maintain possession of his captive, but collaterally

[15] 144 F. 2d 927 (9th Cir. 1944).
[16] 326 U.S. 135, 149, 167 (1945).

has now become the tool to review a whole proceeding in deportation. Interesting, because of the constant and apparent refusal of many courts to allow any other attack upon one phase of immigration work, the deportation of aliens whom the Attorney General has determined are illegally in the United States. The alien seeking redress of his grievances in deportation cases has sought various and diverse ways to review the order of the Attorney General, but with the exception of a writ of habeas corpus (which has no historical legal relationship to the problem) they have been refused by the courts; thus a petition for a writ of certiorari to review the determination of the Secretary of Labor issuing a warrant of deportation was denied;[17] a suit to restrain by temporary injunction was denied.[18] In *Bata Shoe Co., Inc.*, v. *Perkins*,[19] the District Court of the District of Columbia used these very exacting words: "If the party sought to be deported is not afforded a full, adequate hearing, in which the findings are supported by substantial evidence; or, if the law is mistakenly applied in such proceedings, judicial relief can be had by the writ of habeas corpus." A writ of prohibition was denied with the observation that a habeas corpus proceeding was the proper remedy to review deportation proceedings;[20] but it was the Court of Appeals of the District of Columbia which announced the rule that where there was an order of deportation "By surrendering to the proper immigration officer, the writ of habeas corpus will be available to appellant."[21] It was not sufficient that the Attorney General may not have had authority to issue the order—the alien must put himself into the custody of the Attorney General for deportation before he could test the latter's authority. Even bail was not always available. Thus the ancient writ of habeas corpus has come down through the common law, to become part of the judicial process in the treatment of aliens in deportation matters. While the situation so far described is previous to June 11, 1946, when the Adminis-

[17] *In re* Ban, 21 F. 2d 1009 (W.D. N.Y. 1927): "The writ of certiorari, which is a discretionary writ at common law, will not issue where the petitioner has a plain and adequate remedy by habeas corpus, or otherwise. In this conclusion I follow the reasoning of Judge Hough in United States v. Rauch (D.C.) 253 F. 814."

[18] Rash v. Zurbrick, 6 F. Supp. 390 (E.D. Mich. 1934) "On the contrary, there is substantial authority for the proposition that a bill in equity by an alien to obtain a declaration of his right to remain in the United States will not lie."

[19] 33 F. Supp. 508 (D.C. 1940).

[20] Poliszek v. Doak, Secretary of Department of Labor, 57 F. 2d 430 (D.C. Cir. 1932).

[21] Fafalios v. Doak, Secretary of Labor, 50 F. 2d 640 (D.C. Cir. 1931). See also Kabadian v. Doak, Secretary of Labor, 65 F. 2d 202 (D.C. Cir. 1933) (Writ of Prohibition).

trative Procedure Act was passed, controversy, even among judges, has continued since that date.

There is, however, much more to the review of the acts of the Attorney General of the United States than the review of his orders of deportation. That is the situation which is more widely known; but a study of the immigration laws shows that the power of the Attorney General extends to other immigration fields, in which an improper use of the power can create havoc just as great as that wrought by an unjustified deportation. The power of the Attorney General in dealing with immigration begins from the day that the alien arrives in the United States, and does not cease until the courts have placed upon that alien the mantle of citizenship. Even then it does not end, for in matters involving relationship between that citizen and other aliens, who seek the privilege of entering based upon the citizenship of their relatives, the Attorney General still maintains a complete and absolute control. There are a great number of situations which, while administrative in the method by which they are adjudicated, are either judicial or semi-judicial in their nature. These must now be carefully considered.

It must not be supposed that the beginning and end of all things in immigration is in the process of deportation. This is the spectacular phase of the work of the Department of Justice, and that which usually attracts the greatest public attention. But there are a number of problems which to the alien involved are equally as important as deportation. Let us illustrate some of them to see their application to the use of the writ of habeas corpus in adjusting or reviewing a final order of the Attorney General.

One problem involves exclusion proceedings. The Act of February 5, 1917, as amended,[22] provides in Section 3 for the exclusion of a number of classes of aliens ranging from idiots to natives of what are now generally known as the "barred zone" nationalities. The practice is to refuse them admission even after a consul has granted a visa, for the power to admit into the United States lies solely with the Department of Justice. The anomaly that exists is that the alien, even before he has been admitted to the United States or set foot on our soil, is considered to be in the custody of the Attorney General, and the cases are legion to the effect that the remedy for such aliens is to test the power of the Attorney General by writ of habeas corpus.[23] If, as is logically true, the alien has not yet arrived until he is admitted, it cannot be said that the Attorney General has taken him into captivity, so that the theory of habeas corpus as it was originally understood might well

[22] 39 STAT. 874 (1917); 8 U.S.C. §175 (1946); 57 STAT. 553 (1943), 8 U.S.C. §156 (1946).

[23] 8 U.S.C.A. §155 (226 *et seq.*) (1942).

be applied, and the writ refused. The many cases allowing it as a collateral proceeding to attack the jurisdiction and power of the Attorney General insist however, that the writ must be the basis by which the power of the Attorney General to exclude shall be tested. It should be noted that in exclusion proceedings provision was made for an administrative procedure, but no provision was made for judicial review of that procedure.[24]

Another problem involves derivative citizenship. Prior to January 13, 1941,[25] a child born abroad of an American father, who at one time resided in the United States, was a citizen of the United States provided he entered the United States for a permanent residence before his twenty-first birthday. This provision of Section 1993 of the Revised Statutes was later amended so as to allow for derivation through both the father and mother, with a number of provisions not germane to the matter under discussion.[26] Cases still arise under this statute, although it has been repealed. Regulations under which such a certificate shall be issued are prescribed, and these are strictly enforced. They require proof of the marriage of the parents, proof of the birth of the applicant, sometimes of records long destroyed. Secondary evidence may be accepted, but the examiner to whom the case is assigned for a hearing generally determines the course and nature of the proceedings. The proceedings are subject to review by the Commissioner of Immigration, but the above requirements must be met in any case. The regulations do not provide for the appearance of counsel in such proceedings except on appeal from the decision of the primary examiner, and there is no provision for judicial review.[27]

The proof of derivative citizenship is not always a simple matter. There are the complications of documents and their significance and application, and once the record is made it is not so simple to undo it. Let us suppose that the primary inspector who makes the examination of the applicant is not satisfied with the evidence to prove the legal marriage of the parents or the relationship of the applicant to his parents. It is impossible by any stretch of the imagination to see how a writ of habeas corpus would apply in such instance as a mode of testing the right of the Attorney General to refuse the issue of a derivative certificate. A bill for a declaratory judgment has been held to lie.[28] The procedure here advocated is that provided for under the Administrative Procedure Act of 1946, of which more will be said later.

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[24] 39 STAT. 885–887 (1917), 8 U.S.C. §152–3 (1946).

[25] See §504, Nationality Act of 1940 (54 STAT. 1172–1174) (1940) p. 410 for repealing provisions.

[26] §1, Act. of May 24, 1934, 48 STAT. 797 (1934); See note 25.

[27] See Immigration and Nationality Laws and Regulations, Part 379.

[28] Ginn v. Biddle, 60 F. Supp. 530 (E.D. Pa. 1945).

A third problem is that of Pre-Examination. Under the Immigration Act of May 26, 1924, as amended,[29] admission is granted to:

> (a) An immigrant who is the unmarried child under twenty-one years of age, or the wife or the husband of a citizen of the United States: Provided, That the marriage shall have occurred prior to issuance of visa and, in the case of husbands of citizens, prior to July 1, 1932.[30]

The Act was later amended changing the date July 1, 1932, to January 1, 1948.[31]

Under this non-quota provision, an alien wife of an American citizen, who is residing in the United States but has not been admitted for permanent residence, may by a process called Pre-Examination be examined as to her admissability for permanent residence previous to her appearance before an American Consul for the filing of a formal application for a visa.[32] The regulations require certain factual and documentary proof of admissibility. There is no provision for judicial review, and it is hard to conceive how a writ of habeas corpus can apply to test the Examination, when the applicant is not even under physical restraint. The regulations provide for an appeal to the Board of Immigration Appeals; there again, even the philosophy of the Supreme Court in the *Bridges* case could not possibly apply.[33]

The final problem to be considered in this connection is that of registry. Section 328 of the Nationality Act of 1940[34] provides for the registry of aliens, so as to create a record of arrival for permanent residence, provided: they entered before July 1, 1924, and resided here continuously, are persons of good moral character, and not otherwise subject to deportation. The requirements of the Act are governed by regulations[35] which require proof of actual residence in the United States previous to July 1, 1924, and continuous residence thereafter. The proof must be evidential in nature and not merely self-declaratory. In the passage of time such proofs are not always available, but the burden of proof is nevertheless upon the applicant. Neither the law nor the regulations provide for judicial review. The issuance of a certificate of registry is wholly administrative and is a matter solely for the Commissioner of Immigration and Naturalization. Unless the Administrative Procedure Act applies, it is doubtful that the discretion given to the Commissioner of Immigration can in any way be re-

[29] 43 STAT. VEC (1924), 8 U.S.C. §201 (1946).

[30] §4–A.

[31] Act of May 19, 1948; P.L. 538 of the 80th Congress.

[32] 8 CODE FED. REGS. §142.1 (1949).

[33] Regulations for Pre-examination are found in 8 CODE FED. REGS. §142 (1949).

[34] 54 STAT. 1137 (1940), 8 U.S.C. §907 ((1946).

[35] See 8 CODE FED. REGS. §362 (1949).

viewed. Certainly by no stretch of the imagination can the subject matter be reached by an application for a writ of habeas corpus.

A summary of the various proceedings, including the proceedings in deportation, before the Immigration and Naturalization Service shows clearly that the writ of habeas corpus even as a means of a "collateral" attack is unsatisfactory, archaic and illogical. The problems which arise under the immigration laws of the United States cannot be solved by its use. In most instances they cannot even be reached by such a process. When the lives of people, their families, their homes, their fortunes and their entire future are in the balance, it is distressing to realize that previous to June 11, 1946, there was no complete, definitive process which reached one of the great human problems of the nation's life. It is the writer's contention that the Administrative Procedure Act was intended to be, and is, the answer given by Congress to the absence of an adequate remedy which we have described.

Nor must it be supposed that this problem is merely theoretical. In *Kavadias v. Cross*,[36] habeas corpus was brought primarily to test the power of the Attorney General with relation to his right to suspend deportation;[37] in *United States* ex rel. *v. Garfinkel*[38] the writ was issued to test the power of the Board of Immigration Appeals in its refusal to reopen a hearing for suspension of deportation; In *United States* ex rel. *Stabler v. Watkins*[39] habeas corpus was brought where the real issue was the right to enter a default judgment in a proceeding cancelling a certificate of naturalization; In *United States* ex rel. *U.S. Lines on behalf of Colovis v. Watkins*[40] a writ of habeas corpus was issued to test the legality of an order of an immigrant inspector to detain an alien seaman; in Ex parte *Van Laeken*[41] a writ of habeas corpus was issued to test the correct definition of an "entry" where such entry was prejudicial to the interests of the United States Government. Also in In re *United States* ex rel. *Obum* (Ex parte *Johnson*)[42] a writ of habeas corpus was issued to test the extent of the power of the Board of Medical Officers who examine aliens upon admission; in *United States* ex rel. *Russo v. Thompson*[43] a writ of habeas corpus was issued to test the right of the Immigration Service to confine an alien in the Federal House of Detention rather than at a place under the juris-

[36] 82 F. Supp. 716 (N.D. Ind. 1948).
[37] §19 c., Act of Feb. 5, 1917.
[38] 77 F. Supp. 751 (W.D. Pa. 1948).
[39] 168 F. 2d 883 (2nd Cir. 1948).
[40] 170 F. 2d 998 (2nd Cir. 1948).
[41] 81 F. Supp. 79 (N.D. Cal. 1948). See also United States *ex rel.* Schirrmeister v. Watkins, 171 F. 2d 858 (2d Cir. 1949).
[42] 82 F. Supp. 36 (S.D. N.Y. 1948).
[43] 172 F. 2d 325 (2d Cir. 1949).

diction of the Immigration Service; in *United States* ex rel. *Chu Leung v. Shaughnessy*[44] a writ of habeas corpus was issued to test the right of administrative determination of citizenship in exclusion proceedings.

All of these illustrations reach toward the same conclusion, which is that the entire theory of the writ of habeas corpus as it has historically developed has now become meaningless. It does not do to say that because the courts have allowed the writ to be used for the purposes outlined above, there is no need for complaint. There is need to complain when archaic symbolisms are used (perhaps because of their high-sounding phrases) to reach a mere partial solution; when the real goal of a review proceedings is not attained although a means is at hand. The alternative available is to hold the entire immigration process reviewable by a simple and direct procedure under the Administrative Procedure Act.

THE ADMINISTRATIVE PROCEDURE ACT

Congress enacted the Administrative Procedure Act of 1946,[45] to provide additional legal controls over the action of administrative agencies. The provision pertinent to this discussion is Section 10, which provides:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . .
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> (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. . . .
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> (b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law. . . .
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> (c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review . . .
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> (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully with-

[44] 83 F. Supp. 925 (S.D. N.Y. 1949).

[45] 60 STAT. 237, 5 U.S.C. §1001 *et seq.* (1946).

> held or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The first question which arises in the application of the Act to immigration proceedings involves the first sentence quoted above. Neither the Attorney General nor the Department of Justice as an agency is expressly exempted from the Act, which with a few functional exceptions applies generally to all federal administrative agencies which make final rules.[46] The Immigration and Naturalization Service has contended that the Act does not apply to it, but has favored a number of attempts to obtain specific exemption in Congress.

The Immigration Act of 1917 provides, as to exclusion, that in every case where an alien is excluded from admission to the United States ". . . the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General."[47] Similarly, as to deportation, it is provided that where any person is ordered deported ". . . the decision of the Attorney General shall be final."[48] The problem is thus whether the immigration statute precludes judicial review of orders of exclusion or deportation, within the meaning of the exception in Section 10 of the Administrative Procedure Act. It has already been shown that these orders of exclusion and deportation have, for a long time prior to the Administrative Procedure Act and despite the wording of the Immigration Act, been subjected to judicial review of a sort by means of the writ of habeas corpus.

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[46] See Ohio Power Co. v. N.L.R.B., 164 F. 2d 275 (6th Cir. 1947) (contra for an intervening order); Kirkland v. Atlantic Coast Line R. Co., 167 F. 2d 529 (D.C. Cir. 1948) (contra under Railway Labor Act); Dallas v. Rentzel, 172 F. 2d 122 (5th Cir. 1949) (contra under Federal Airport Act); Great Lakes Steel Corp. v. United States, 81 F. Supp. 450 (E.D. Mich. 1948) (contra under Interstate Commerce Act); Fischer v. Haeberle, 80 F. Supp. 652 (E.D. N.Y. 1948) (Veterans Preference Act); Zander v. Clark, 80 F. Supp. 453 (D.C. 1948).

[47] 39 STAT. 887 (1917), 8 U.S.C. §153 (1946).

[48] 39 STAT. 890 (1917), 8 U.S.C. §155 (1946).

To that extent the immigration statutes have already been construed as not precluding judicial review. In addition, in the writer's opinion, the whole purport of the Administrative Procedure Act and especially the wording of Section 10—its breadth, the powers granted to the courts, its wide application to persons suffering legal wrong, the remedies granted—clearly indicate any intent by Congress to set up a new procedure to be used after the administrative action (in this instance of the Attorney General) became final, *i.e.*, was at an end. Numerous portions of the legislative history of the Act can be cited to support such a viewpoint. An example, as to agency discretion, is the following Senatorial discussion:

> MR. DONNELL: I should like to ask the distinguished Senator a question. . . It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?
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> MR. MCCARREN: Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.
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> But in answer to the first part of the Senator's question—namely, where a review is precluded by law—we do not interfere with the statute, anywhere in this bill. Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress.
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> MR. DONNELL: But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?
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> MR. MCCARREN: It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning. . . .
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> MR. AUSTIN: Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?
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> MR. MCCARREN: That is correct.
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> MR. AUSTIN: And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and pro-

viding a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

MR. MCCARREN: That is true; the Senator is entirely correct in his statement.[49]

As to preclusion of judicial review other remarks in the Senate might be noted:

MR. AUSTIN: In the event that there is no statutory method now in effect for review of a decision of an agency, does the distinguished author of the bill contemplate that by the language he has chosen he has given the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, quo warranto, and so forth?

MR. MCCARREN: My answer is in the affirmative. This is true.

MR. AUSTIN: And does he contemplate that even where there is no statutory authority for certiorari, a party might bring certiorari against one of these agencies?

MR. MCCARREN: Unless the basic statute prohibits it.[50]

In the House of Representatives Congressman Walter presented the bill which led to passage of the Administrative Procedure Act, and said of Section 10(d): "The decision of an agency created by statute that prohibits a review is the only one excluded. We are anticipating the possibility that some time or other such an agency will be erected."[51] The House Report had said: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review."[52] The Act itself, as already indicated, provides in Section 10(c) that ". . . every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." Elsewhere the term "final" is used in the same sense; and it seems clear that the finality given the Attorney General's decision by the Immigation Act is no more than this finality of completion, after which Section 10 contemplates that there may generally be judicial review. The prior construction of the Immigration Act, and the legislative history and wording of the Administrative Procedure Act, give clear indication that the agency orders here being discussed are to be subject to such review.

The remaining question is as to form and scope of review under the Act. There is no form of special statutory review proceeding relevant to the subject matter of these immigration matters. In its absence, Section 10(b) makes available ". . . any applicable form

[49] Sen. Doc. No. 248, 79th Cong., 2d Sess. 310–311 (1947).
[50] *Id.* at 325–326.
[51] *Id.* at 380.
[52] *Id.* at 275.

of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) . . ." As we have seen, prior to the Administrative Procedure Act, habeas corpus was held to be the only form of judicial review available in exclusion and deportation proceedings. It has been argued that "any applicable form" means the form of action applied by courts to the particular proceeding in cases decided before the Act, and that habeas corpus is still the exclusive remedy.

It is the writer's position that "applicable" should and does mean, not only habeas corpus, but any form of legal action appropriate for securing justice in the particular situation. The provisions of Section 10(e) require the reviewing court to compel agency action unlawfully withheld or unreasonably delayed, and to set aside agency action found to be unlawful. It was clearly not the intent of Congress to limit the reviewing court in its power to undo any administrative injustice. Section 10(d) authorizes the reviewing court, pending judicial review, to postpone the effective date of agency action and otherwise preserve the status quo until conclusion of the review proceedings. Since the Act itself specifies this broad scope of review and interim relief in any and every review proceeding, it may be that the procedural form of review is immaterial, since the reviewing court would have at least these powers and duties, whether the review action is nominally habeas corpus or something else.[53] If not so expanded, habeas corpus as the sole remedy would clearly be inadequate, because in its traditional form it would permit nothing like the scope of review and relief contemplated in the Act.

Even as broadened by the provisions of Section 10, habeas corpus would be inadequate as the sole remedy in deportation and exclusion proceedings, because traditionally it cannot be brought until the petitioner is in custody. In many sorts of cases this requirement creates great and unnecessary hardship. An alien who has already been adjudged deportable by the administrative officials cannot test by habeas corpus the legality of their result or their proceedings until he is apprehended for deportation. Normally the Immigration and Naturalization Service will not arrest an inoffensive resident alien until very shortly before deportation. He is thus faced with the risk of guessing correctly whether to wind up his affairs or not. If he is removed to a point of embarkation distant from his home, or if for some other reason the writ cannot be served before the ship sails he may actually be deported without having been able to test the order. He may attempt to submit to arrest in advance of deportation for purposes of the test; but the Service need not detain him unless it wishes to, and

[53] See Note, 49 COL. L. REV. 73 (1949).

if he is arrested and then paroled, the matter may have become moot. In exclusion proceedings, the traditional rule that the judgment in habeas corpus must be either a remand to custody or a discharge from custody causes another sort of difficulty. It may result in outright release of an excludable alien, when all he had a right to was a hearing, or some other change to proper procedure in the course of the exclusion.

A number of decisions rendered since the effective date of the Administrative Procedure Act have considered the question of its applicability to immigration proceedings; most of them involved deportation. There has been no general agreement among these courts as to whether the provisions for judicial review apply, and if so, whether they extend the procedural forms available beyond habeas corpus. In *United States* ex rel. *Trinler v. Carusi*,[54] an alien had been ordered deported. Before being taken into custody, he filed a "petition for review" of the order in the federal court. On appeal, a majority of the Court of Appeals for the Third Circuit held the proceeding a proper remedy for testing the deportation order, under the Act, although (perhaps because) habeas corpus would not have lain, since petitioner was not yet in custody. Judge Goodrich analyzed the deportation process and the Act in these words:[55]

> While it might look as though judicial review were precluded by the giving to the deportation order the air of finality, in practice such finality never existed because of the availability of habeas corpus. The fact that review has been judge-made out of the concept of due process does not make it any less a qualification of the statute than if the legislators had put the provision in it when the statute was first drawn . . . We express at this point no opinion whatever upon the merits of the petitioner's case. All we are deciding is that under the Administrative Procedure Act of 1946 he is entitled to have judicial review as one adversely affected by the deportation order after its promulgation but before he has been taken into custody.

In *United States* ex rel. *Camaratta v. Miller* the court allowed a "petition for review" although the alien was in custody, and granted relief which included ordering the re-opening of the deportation proceedings, releasing petitioner on bond, and staying the warrant of deportation.[56] Additional cases have recognized the force of the *Trinler* decision, but left open the question of judicial

[54] 166 F. 2d 457 (3d Cir. 1948), in which case the writer was counsel for the petitioner. The action was later declared abated, 168 F. 2d 1014 (3d Cir. 1948), but the opinion was not withdrawn, and its reasoning and logic still stand.

[55] 166 F. 2d 457 at 461, 462 (3d Cir. 1948).

[56] 79 F. Supp. 643 (S.D. N. Y. 1948); see also United States *ex rel.* DeLucia v. O'Donovan, 82 F. Supp. 435 (N.D. Ill. 1948).

review under Section 10.[57] A number of cases, on the other hand, have denied that Section 10 applies to immigration proceedings in such fashion as to change the pre-existing rule making habeas corpus the sole remedy.[58]

Other cases have denied application of other sections of the Act, although these involved additional and different considerations.[59] Broadly, these adverse decisions have involved Section 5, governing agency adjudications, Section 7, governing hearings, and Section 11, regulating appointment of hearing examiners. Perhaps the case which caused the greatest distrubance to the Immigration and Naturalization Service was *Eisler v. Clark*.[60] The court there held that the Act, including Section 11 regulating the appointment of hearing inspectors, applied to the deportation process. It concluded:[61]

> On that question the Court is of the opinion that the Courts have read due process into the Act, and due process means a hearing, and that therefore hearing is an integral part of the Deportation Act; in fact, just as much as if the Act itself in words stated that a hearing should be held.

The action was for a declaratory judgment that petitioners were entitled to a hearing governed by the Administrative Procedure Act, and injunctive relief; this was granted by the court. The effect of the decision would be to require the Immigration and Naturalization Service to comply with Section 11, by using examiners appointed under Civil Service procedure. This would remove the power of the present immigration inspectors to hold deportation hearings. Section 6, which if applicable would assure the alien broad rights to counsel, perhaps forcing changes in the regulations now in force,[62] has not been passed upon, but seems clearly applicable to all agencies, and does not have the limitations included in other sections. The United States Supreme Court has yet to pass upon any of these problems. In one case before it, the application of the Hearings section was raised, but the decision passed off on other points.[63] The issue of the application of the Act in immigra-

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[57] Azzollini v. Watkins, 172 F. 2d 897 (2d Cir. 1949); Scholnick v. Clark, 81 F. Supp. 298 (D.C. 1948).

[58] Valenti v. Clark, 83 F. Supp. 167 (D.C. 1949); Yiakoumis v. Hall, 83 F. Supp. 469 (E.D. Va. 1949).

[59] United States *ex rel.* Johnson v. Watkins, 170 F. 2d 1009 (2d Cir. 1948), *rev'd sub. nom.* United States *ex rel.* Johnson v. Shaughnessy, 336 U. S. 924, 947, 69 S. Ct. 921 (1949); United States *ex rel.* Knauff v. Watkins, 173 F. 2d 599 (2d Cir. 1949), *cert. granted* May 2, 1949; Yiakoumis v. Hall, 83 F. Supp. 469 (E.D. Va. 1949); *Ex parte* Wan, 82 F. Supp. 60 (N.D. Cal. 1948).

[60] 77 F. Supp. 610 (D.C. 1948).

[61] 77 F. Supp. 610 (D.C. 1948).

[62] See 8 CODE FED. REGS. §§142.1, 150.1 (c), 362.3, 370.8, 379.3 (1949).

[63] United States *ex rel.* Johnson v. Shaughnessy, 336 U.S. 924, 947 (1949).

tion proceedings is again before the Court, however, and it is entirely possible that some of these questions may be determined in its coming term.[64]

CONCLUSION

For the guidance of litigants, administrative officials and judges, an authoritative settlement of the whole problem is necessary. As indicated, the aliens involved have appealed to the courts to apply the Administrative Procedure Act to exclusion and deportation proceedings. The Attorney General has resisted such application, and his instructions to the officers of the Immigration and Naturalization Service have been based upon his position.[65] In addition, the Attorney General and the Service have pressed for express legislative adoption of their views, by specific exemption of the Service from the requirements of the Act.[66] In the present Congress, H.R. 10 and S. 1832 seek this result.[67]

It is hard to understand why such exemption is desirable, particularly regarding the provisions for judicial review. The immigration laws of the United States and the problems which arise thereunder cannot be judicially reviewed with certainty and promptness by the writ of habeas corpus alone. A collateral and "backhanded" procedure is not the ideal means to determine the happiness and welfare of a substantial portion of the resident population.

[64] United States *ex rel.* Knauff v. Watkins, 173 F. 2d 599 (2d Cir. 1949), *cert. granted* May 2, 1949; Sung v. Clark, 80 F. Supp. 235 (D.C. 1948), *aff'd per curiam* 174 F. 2d 158 (D.C. Cir. 1949), *cert. filed* July 1, 1949.

[65] See Atty. Gen. Manual on the Admin. Proc. Act (1947).

[66] See H.R. 6652, 80th Cong., 2d Sess. (1948); S. 2755, 80th Cong,, 2d Sess. (1948).

[67] 81st Cong. (1949).